Supreme Court, U.S.
FILED

961413 MAR 7 1997

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES H. LEIDNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED FOR REVIEW

I

The magistrate issued an anticipatory warrant to search Charles Leidner's home, but neither the warrant nor the supporting affidavit conditioned its execution upon the marijuana's delivery. Furthermore, the only connection between the marijuana and Leidner's home was the deliverer's claim that it belonged to Leidner. It is undisputed that the deliverer, Steven Sapp, made inconsistent statements to the police, that he admitted to making a prior drug delivery, and that he was a drug suspect at the time of his arrest.

The District Court ruled that this failure to condition the warrant's execution on delivery made the warrant constitutionally defective, but the Seventh Circuit found the warrant valid. A Seventh Circuit majority further held that Sapp's accusation was sufficiently credible under *Illinois v. Gates* to give rise to probable cause for issuing the warrant. Judge Diane Wood, however, found the warrant unconstitutional and would require, as part of the probable cause showing for an anticipatory warrant, a showing of some pre-existing nexus between the contraband and the place to be searched that is not wholly within the government's control. Thus, the first two questions presented are:

A.

Is an anticipatory warrant constitutional if there is no representation among the warrant papers conditioning its execution upon delivery of the illegal goods?

B.

Was there probable cause to believe that the drugs belonged to Leidner when the warrant issued?

II.

Before swearing out the warrant the police did not independently corroborate Sapp's statements other than to substantiate that Sapp had rented the car in which the drugs were found and that he resided in Fayette County, Illinois. Thus, the third question presented is:

Did the police act objectively reasonably in procuring the warrant without independently corroborating Sapp's claims?

III.

In issuing the anticipatory warrant, Judge Harvey did not precondition the warrant's execution nor require written representation that the police would not execute the warrant until delivery. Thus, the fourth question presented is:

Did Judge Harvey abandon his role as a detached and neutral magistrate?

LIST OF ALL PARTIES TO THE PROCEEDING

1) United States of America.

2) Charles Leidner.

3) No Corporation is involved.

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OPINION BELOW

The November 7, 1996 Opinion of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is reported as Case No. 96-1570 and is reprinted in the Appendix at page A-1. By order filed December 9, 1996, the Seventh Circuit denied Charles Leidner's Petition for Rehearing.

JURISDICTION

On November 7, 1996, the Seventh Circuit Court of Appeals rendered its order and judgment reversing and remanding the decision of the United States District Court for the Southern District of Illinois. On November 20, 1996 Petitioner timely filed a Petition for Rehearing which was denied by the Seventh Circuit Court of Appeals on December 9, 1996. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

The District Court exercised original jurisdiction under 18 USC 3231.

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

STATUTE INVOLVED

U.S. CONSTITUTION

AMENDMENT IV.

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

I. Facts

On October 15, 1995, at about 9:30 a.m., Corporal Jeff Heath of the Missouri Highway Patrol pulled over Steven Sapp for driving 72 m.p.h. in a 65 m.p.h. zone. (Transcript of Suppression Hearing at 4, hereinafter referred to as "T4") This was in Pemiscot, Missouri, about 3 hours from St. Louis.

Heath brought Sapp into the squad car and began questioning him. Sapp said he was a truck driver. He added that he wasn't driving his pickup because it was in the shop for repairs. He explained that he was on his way back from Memphis where he had visited Graceland. (T9, 10) Sapp said he didn't know how many days he had been in Memphis and that he didn't know where he had stayed. (T10)

After issuing a warning ticket, Heath asked Sapp if there were drugs in the car. Sapp denied there were any drugs and let Heath search the car. (T8, T24) In the trunk, Heath found duffle bags containing what he believed to be cannabis.

Heath promptly arrested Sapp and renewed his questioning. Sapp denied knowing how the drugs had got there. (T24) Heath learned that the car was rented, and Sapp handed him the rental agreement, which showed the car in his name. (T6-T7) At one point Sapp told Heath that he was a heavy equipment operator. (T11)

Heath took Sapp to Hayti, Missouri, where Sapp was interviewed by Trooper William Cooper of the Missouri State Highway Patrol. (T9) Cooper is employed in the Division of Drug and Crime Control, the criminal investigations division of the Missouri State Police. (T18) Cooper questioned Sapp, alone, for about 45 minutes to an hour. (T19)

Sapp changed his story and told Cooper he had picked up the drugs at a Union 76 truck stop in Memphis. (T22). He said that

he had left his car in the parking lot and his keys in the car. (T22) When he returned, the drugs were in the trunk. (T22)

Cooper told Sapp that if he wanted to cooperate by delivering the drugs he would talk to the prosecuting attorney about his cooperation. Sapp apparently brought up probation, saying he had three kids at home and didn't want to be away from them. Cooper may have told him it was a long time to be away from his family. (T22-23) Cooper added that he could be looking at 15 years or better. (T22)

Sapp then changed his story again and told Cooper that he did not get the drugs in Memphis but in Houston. (T23) He would find a hotel, get a room, leave his car unlocked with the keys, and when he woke up the next morning the drugs would be in the car. (T25) He said that he had lied about getting the drugs at the Union 76 truck stop. (T23) He now said the drugs belonged to a fellow named Leidner. Cooper was apparently satisfied with this response and Sapp agreed to deliver the marijuana to Leidner's home in Fayette County, Illinois. (T22)

Heath then joined Cooper and Sapp. (T12) Sapp told Heath that he had gotten the drugs not from Memphis but from Houston. Sapp added that he had stayed in various motels in the Houston area. (T12) Heath now thought that Sapp had lied when he said he had been in Memphis. (T12-T13)

Heath telephoned Kelvin Worker. (T34) Worker is a Fayette County, Illinois Deputy loaned out to the Southeastern Illinois Drug Task Force (T30), which is run by the Illinois State Police. (T31)

Heath told Worker that he had Sapp under arrest. Worker knew Sapp and had previously interviewed him regarding an earlier violation of the law. (T34) Indeed, Sapp was already under suspicion for drug activity. (T35) Worker then talked to Sapp briefly over the phone. Worker did not apparently question

Sapp about his previous stories but did verify that he was now in Missouri. (T53-55) Worker told Sapp that he was doing the right thing by taking the drugs to Leidner. (T53)

Worker then drove past Leidner's for a description that could be used in applying for a search warrant. (T70-71) Meanwhile, Officers Heath and Cooper were en route to Illinois with Sapp. (T13-14)

Around 5:03 p.m., Worker presented his Warrant Affidavit to Judge Harvey at his residence in Effingham County, Illinois. (T50-51) After describing Leidner's trailer, Worker's search warrant complaint reads as follows:

> "Complainant has probable cause to believe that cannabis will be located in the residence, based upon the following facts:
>
> 1. That on October 15, 1995, your complainant, Inspector Kelvin Worker of the Southeastern Illinois Drug Task Force, was notified via telephone by Corporal Jeff Heath of the Missouri Highway patrol, that a John Doe had been stopped on a routine traffic stop and approximately 200 pounds of cannabis was found in John Doe's vehicle.
>
> 2. John Doe advised Corporal Heath that he had left Fayette County, Illinois and went to Texas where he purchased approximately 200 pounds of cannabis. John Doe was in the process of delivering said cannabis to Charles Leidner at Leidner's residence, located in rural Fayette County, Illinois.
>
> 3. John Doe is personally known by your complainant and is known to also reside in Fayette County, Illinois.
>
> 4. That the statements made by John Doe are against his penal interest, which enhances his reliability.

5. That John Doe has agreed to cooperate with law enforcement personnel in Missouri and Illinois, and is expected to deliver said cannabis to Charles Leidner at Charles Leidner's residence, located in rural Fayette County, Illinois, today being October 15, 1995.

6. That Corporal Heath is an experienced highway patrolman and as such knows the purported cannabis to be cannabis.

Wherefore Complainant prays that a search warrant may issue according to law."

Judge Harvey found the facts sufficient to show probable cause and issued a warrant to search "the residence occupied by Charles Leidner, located in rural Fayette County, Illinois, more particularly described as a single mobile home, beige in color, with brown trim and a screened-in porch."

Worker would later testify at the suppression hearing that Judge Harvey told him that since the warrant was an anticipatory search warrant Worker had to wait until Sapp made the delivery to the residence before he could execute the search warrant. (T-65,66) Apparently, the Complaint for Search Warrant was neither attached to the search warrant nor incorporated therein. (T69)

At about 5:30 p.m., Heath, Cooper and Sapp met with Worker in Illinois. They were joined by two other Illinois State Police members: Master Sergeant Kim Rhodes and Sergeant Kelly Henby. (T14, T51)

Sapp's vehicle approached Leidner's at 8:42 p.m. (T77) But Leidner was not home. A fellow by the name of James Thompson helped Sapp unload the duffel bags, and Sapp departed at about 8:48. (T61, T78)

At about 9:24, Leidner came home from his ex-wife's where he had been celebrating his son's birthday. (T62, T79) Minutes later, Worker went to the door to execute the search warrant. There were at least four officers at the front door. (T58) Leidner rose to answer. (T57) James Thompson, who was also in the home, fled and was arrested out back. The mobile home had been surrounded.

At no point did anyone field-test or conduct any test of any manner on the contents of the duffel bags. (T5, T55)

II. District Court Proceedings

On November 20, 1995, a three-count indictment was returned against Charles H. Leidner in the United States District Court for the Southern District of Illinois charging him as follows:

(1) Conspiracy to distribute marijuana, a violation of 21 USC Section 846;

(2) Possession with intent to distribute marijuana, a violation of 21 USC Section 841(a)(1); and

(3) Using and carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 USC Section 924(c).

The United States of America moved for dismissal of Count III ("the gun count"), and the Court granted that motion on January 30, 1996.

On January 12, 1996, Leidner moved to suppress the evidence on the grounds that the anticipatory warrant was unconstitutional. Leidner relied on a First Circuit case, *U.S. v. Ricciardelli*, which found an anticipatory warrant invalid for failing to precondition its execution upon the contraband's delivery to the premises. He further argued that the good-faith exception to the exclusionary rule did not apply as the warrant defects were

largely a product of the police's own misconduct. The District Court for the Southern District of Illinois, the Honorable Paul E. Riley Presiding, agreed, and the Government timely appealed to the Seventh Circuit Court of Appeals in Chicago, Illinois.

III. Seventh Circuit Proceedings

A. The Majority Opinion

On November 7, in an opinion by Circuit Judge Bauer joined by Judge Manion, the Seventh Circuit rejected the District Court's finding that the failure to condition the search on the drugs' delivery made the warrant unconstitutional. While admitting that other Circuits support a preference for such conditioning language, Judge Bauer did not feel it required. He appeared to deny any conflict with *Ricciardelli.*

Also rejected was Leidner's claim that the warrant affidavit failed to establish a pre-existing "nexus" between Leidner's residence and the contraband. Instead, Judge Bauer found that Sapp had made a statement against his penal interest (i.e. his claim that he had made a prior drug delivery) and was therefore reliable under the *Gates*' totality-of-the-circumstances test. In his view, then, there was probable cause for the warrant.

B. Judge Diane Wood's Concurring Opinion

Unlike her brethren, Judge Diane Wood found the warrant constitutionally defective because it failed to ensure that the marijuana was on a "sure course" to Leidner's residence *before* the government's intervention. She notes that when the contraband is admittedly not at the place named in the warrant, it should not be enough for the government itself to transport it to that place and execute the search. To safeguard against such abuses, she would therefore require, as part of the probable cause showing for an anticipatory warrant, a showing of some pre-existing nexus between the contraband and the place to be searched that is not wholly within the government's control. In her view, this nexus did not exist in this case because nothing connected the drugs to Leidner.

Judge Wood, however, concurred in the judgment because she found that the officers had relied on the defective warrant in good faith.

C. Petition for Rehearing

On November 20, Leidner filed his Petition for Rehearing and argued that the Court had misapprehended facts critical to its determination of probable cause. The Petition denied that Sapp's statement about a prior delivery made him credible and added that there was no evidence that Kelvin Worker was aware of any statements by Sapp against his penal interests when he swore out the warrant. This Petition was denied on December 9, 1996.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

There are sound and judicious reasons for granting certiorari.

First, this Court's guidance is needed to clarify the safeguards required for issuing anticipatory warrants. This is particularly true now, as anticipatory warrants are becoming an increasingly popular tool in the government's self-declared war on drug-trafficking. As most anticipatory warrant cases contemplate government delivery of illegal goods to a private residence, clear judicial guidelines are required to ensure that the drugs are in fact delivered to the proper party. Otherwise, an innocent citizen may in fact be charged, tried and convicted for contraband delivered to his door by government agents.

This Court's direction will have the further salutary effect of increasing magistrate assurance in issuing anticipatory warrants and improving judicial efficiency. Although most Circuits apply safeguards to limit police discretion and to guard against other dangers that arise where the government transfers criminal evidence to a citizen's home, these guidelines are neither uniform nor complete. Indeed, the Seventh Circuit appears to employ ***no*** safeguards but merely applies the standards used for ordinary warrants. This uncertainty gives rise to frequent contention between the government and criminal defendants.

Second, this is an excellent opportunity to affirm the extreme boundary of the good-faith exception to the exclusionary rule. This case is a textbook example of police abandoning their investigatory duties and nicely bookends *Leon*.

Third and finally, certiorari should be granted in the interest of justice. Charles Leidner was not even present when the drugs which are the subject of his prosecution were delivered by the government to his home. As a citizen, he ought to have been given an opportunity to refuse them.

I. IS AN ANTICIPATORY WARRANT CONSTITUTIONAL IF THERE IS NO REPRESENTATION AMONG THE WARRANT PAPERS CONDITIONING ITS EXECUTION UPON DELIVERY OF THE ILLEGAL GOODS AND NO PRE-EXISTING NEXUS BETWEEN THE CONTRABAND AND THE PLACE TO BE SEARCHED?

Background

An anticipatory search warrant is a warrant based upon an affiant's pledge that in the future evidence of a crime will be located at a specified place. It is particular to property in transit, where the police, custom agent or postmaster intercepts contraband before delivery. The most frequent scenario involves anticipated mail deliveries of packages known to contain illegal goods, such as cannabis or certain pornographic material. In other cases, the police themselves oversee or assist in the delivery.

At first blush, one might conclude that anticipatory warrants run afoul of the Fourth Amendment's requirement that warrants issue only for probable cause. But many courts and legal scholars feel otherwise. In addition to articulating a strong preference that police obtain judicial approval before searching private premises, they note that the facts put forward to justify an anticipatory warrant are more likely to establish probable cause at the time of the search than the typical warrant based solely upon knowledge of the illegal goods' previous location.[1] Indeed, the clear consensus is that properly done, upon a proper showing with proper safeguards, anticipatory warrants are effective tools in the fight against crime which also respect privacy rights.

Commentators and courts alike, however, recognize that anticipatory warrants pose concerns not present in ordinary

[1]LaFave, Wayne R., *Search and Seizure, A Treatise on the Fourth Amendment*, Third Edition, 3.79(C), et. seq.

warrants. Because these warrants cannot be legally executed when issued, a magistrate necessarily cedes part of his probable-cause determination to the police. It is, after all, the police who will determine if and when the contraband arrives so as to justify a search. One concern, then, is that the warrant will be executed prematurely, before delivery. A second, more fundamental issue involves whether the contraband is delivered to its true destination. In response to these concerns, the Circuit courts have fashioned safeguards to ensure not only that the warrant is executed *after* delivery, but that the police are in fact taking the contraband to the *proper* place.

A. Ensuring that the contraband is at the premises when the warrant is executed.

To ensure that the warrant is executed only when the contraband is safely on the premises, most Circuits employ a two-pronged standard. They require that the contraband be on a "sure course" to the premises and overwhelmingly prefer that the warrant's execution be made "contingent" on delivery.[2] Although the "sure course" and "contingency" standards do not end a court's inquiry into the constitutionality of an anticipatory warrant, when used in conjunction they act as effective safeguards against premature execution and go a long way toward showing that a warrant is based on probable cause.

The "sure course" standard functions as a proxy for the contraband's actual presence on the premises. Put another way, it assures the magistrate that the illegal goods, though currently

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[2] See *U.S. v. Moetamedi*(2 Cir. 1995) 46 F.3d 225; *U.S. v. Gendron* (1 Cir. 1994) 18 F.3d 955; *U.S. v. Ricciardelli* (1 Cir. 1993) 998 Fed.2d 8; *U.S. v. Tagbering* (8 Cir. 1993) 85 F.2d 946; *U.S. v. Rey* (6 Cir. 1991) 923 F.2d 1217; *U.S. v. Garcia* (2 Cir. 1989), 882 F.2d 699; *U.S. v. Dornhofer* (4 Cir. 1988) 869 F.2d 1195.

elsewhere, will be present for the search.[3] A parcel mailed to the premises generally satisfies the "sure course" standard.[4]

In addition to the sure-course requirement, the First, Second, Fourth, Sixth and Eighth Circuits stress that the warrant's execution be *expressly conditioned* on the contraband's arrival.[5] This is to prevent premature execution.[6] Although courts prefer that the condition be stated in the warrant, it is enough if the officer swears to an affidavit promising not to execute the warrant until the contraband is delivered.[7] Presumably, this is a matter of good faith: the officer's word as bond.

Thus, an anticipatory warrant is not invalid where an affidavit, signed and submitted as part of the warrant, states that the warrant will not be executed until the package is delivered and accepted.[8] Nor is a warrant deficient where its supporting affidavit promises to search "subsequent to the delivery of the package tomorrow."[9] An affidavit providing that the warrant would not be executed until after the parcel "is delivered by mail and taken into the residence" is likewise adequate.[10]

Failure to condition execution on the contraband's delivery to the premises, however, arguably makes the anticipatory warrant

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[3] *Ricciardelli*, 998 F.2d at 12.

[4] *U.S. ex. rel. Beal v. Skaff*, (7 Cir. 1969) 418 F.2d 430; See also *U.S. v. Moetamedi*, 46 F.3d 225; *U.S. v. Gendron*, 18 F.3d 955; *U.S. v. Tagbering*, 85 F.2d 946.

[5] See *Moetamedi*, 46 F.3d at 229; *Tagbering*, 985 F.2d 950; *Ricciardelli*, 998 F.2d at 13; *Rey*, 923 F.2d 1217; *Dornhofer*, 859 F.2d 1195.

[6] *Ricciardelli*, 998 F.2d at 13.

[7] *Moetamedi*, 46 F.3d at 229; *Gendron*, 18 F.3d at 967; *Tagbering*, 985 F.2d at 950.

[8] *Tagbering*, 985 F.2d at 950.

[9] *U.S. vs. Rey*, 923 F.2d 1217.

[10] *Gendron*, 18 F.3d at 967.

unconstitutional. This was the case in *Ricciardelli*, where an affiant for an anticipatory warrant conditioned his search of defendant's residence on his receipt of a package containing a pornographic videotape.[11] A return receipt attached to the parcel required the defendant's signature. As defendant was not home for the attempted delivery, he later retrieved the package from the post office. Upon his return, the affiant executed the warrant.

The First Circuit ruled the warrant unconstitutional because it failed to establish an adequate three-way nexus between the criminal activity, the evidence to be seized, and the premises. Rather than conditioning execution on the videotape's arrival, the authorities had relied upon the defendant's personal receipt of the videotape, wherever he might be or go. Thus, under the warrant, once the defendant retrieved the package, the postal inspectors could have searched his abode whether or not he brought the contraband home.

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In this case, neither the warrant nor its affiant, Kelvin Worker, conditioned the search of Leidner's residence on the contraband's arrival. There were therefore no safeguards against premature execution, no promises to await delivery. When the police left Judge Harvey, they were free to execute the warrant immediately.

A warrant unsupported by such an affirmation cannot pass constitutional muster. The First, Second, Fourth, Sixth and Eighth Circuits recognize this and emphasize the need for conditioning language among warrant papers.[12] The magistrate failing to secure such a promise gives the police immediate authority to search a private residence when there is no probable

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[11] *Ricciardelli*, 998 F.2d at 14.

[12] See *Moetamedi*, 46 F.3d at 229; *Tagbering*, 985 F.2d 950; *Ricciardelli*, 998 F.2d at 13; *Rey*, 923 F.2d 1217; *Dornhofer*, 859 F.2d 1195.

cause to do so. Whether the police do in fact execute the warrant prematurely or wait for delivery may bear on whether suppression is appropriate under *Leon*[13] but cannot cure the initial constitutional violation.

Although the majority admits that the Seventh Circuit has only "sparingly addressed the questions of appropriate safeguards" for anticipatory warrants, it unfortunately declines to articulate or adopt any.[14] Indeed, the Seventh Circuit stands alone in upholding anticipatory warrants where execution is *not* conditioned upon delivery in either the warrant or affidavit. This approach fails to account for the increased discretion these warrants cede to the police as well as their potential for government manipulation or abuse.[15]

The majority's effort to reconcile this case with anticipatory warrant law in general and *Ricciardelli*,[16] *Garcia*,[17] and *Bieri*[18] in particular, fails, as in each of these latter cases execution of the warrant was made expressly contingent on the contraband's delivery. In fact, the presence or absence of such conditional language appears to be the critical factor in determining whether anticipatory search warrants are upheld.[19] Thus, in *Ricciardelli*, the warrant was struck precisely because the warrant conditioned search of the residence on receipt of the contraband at the post office, rather than at the suspect's home.[20] Whereas in

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[13] *U.S. vs. Leon*, (U.S. 1984) 486 U.S. 897, 82 Ed. 2d. 677, 104 S. Ct. 3405.

[14] *U.S. v. Leidner*, pg. 6.

[15] *Garcia*, 882 F.2d at 703.

[16] *Ricciardelli*, 998 F.2d at 8.

[17] *Garcia*, 882 F.2d 699.

[18] *U.S. vs. Bieri*; 21 F.3d 811 (8th Cir.), cert denied, - U.S. -, 115 S. Ct 208 (1994).

[19] See, in particular, *Ricciardelli*, 998 F.2d 8 and *Gendron*, 18 F.3d 955.

[20] *Ricciardelli*, 998 F.2d at 14.

Gendron[21] and *Bieri*, relied upon by the majority, the warrant and/or warrant affidavits explicitly conditioned the warrant's execution upon the contraband's delivery.

The *Ricciardelli* warrant and affidavit were far more specific than those in this case, and the majority's attempt to reconcile the results is unconvincing. The *Ricciardelli* warrant was constitutionally defective because it gave the authorities the discretion to execute it *before* the suspect brought the contraband home. But at least in *Ricciardelli* the warrant's execution was contingent on some event linking the suspect (if not necessarily his residence) to the contraband. In this case, the officers were free to execute the warrant without any such link.

B. Ensuring that the crime bear some relation to the place to be searched.

A second issue peculiar to anticipatory search warrants involves the need to link the contraband to the place to be searched. In ordinary warrants, the contraband's presence at a given location provides an independent reason for the search as well as evidence of guilt. An anticipatory warrant is unique in that *absent a future contraband delivery, there would be no probable cause to search the premises.*

A magistrate, then, must ensure that a nexus exists *independent of the prospective delivery* between the site and the contraband. Put another way, a magistrate must be reasonably satisfied that the contraband is on a sure course to the place to be searched *before delivery*. Otherwise, the police might name anyone, effectively transforming an anticipatory warrant into an unconstitutional general warrant.[22] What's more, they would have delivered the actual subject of the search to the premises, thereby ensuring a successful operation. In order to prevent such

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[21] *U.S. vs. Gendron*, (1 Cir. 1994) 18 F.3d 955.

[22] *U.S. vs. Leidner*, pg. 16.

manipulation, Judge Wood would require "a showing of some pre-existing nexus between the contraband and the place to be searched not wholly within the government's control."[23]

Admittedly, the pre-existing-nexus inquiry's importance varies from case to case. For example, it is less an issue where the person at the residence pre-approves the delivery[24] or where the contraband is addressed to the residence.[25] In those instances, there is probable cause that the illegal goods bear some relation to the residence or a person residing there. But, as Judge Wood recognizes, this is not always true.

U.S. v. Leidner

In this case, a lying criminal with no history of reliability, Steven Sapp, through his unsubstantiated word alone, mobilized police in two states to deliver a trunk-load of cannabis to the home of an apparently upstanding citizen, Charles Leidner. Based solely on this self-same word, a warrant to search Leidner's residence was also issued. Not once before the warrant's issuance did the police or magistrate seek to verify that the drugs belonged to Leidner or that he was in anyway connected to them.

Given the circumstances, the police's unquestioned reliance on Sapp's word is troubling. Sapp, after all, had already proved less than honest. Upon being stopped, he told the police several stories. First, he denied there were any drugs in the car and said he was a truck driver. Then he said he was a heavy equipment operator. When the drugs were found, he denied knowing how they got there,[26] then said he had picked them up at a Union 76 truck stop in Memphis. After that, he said that the drugs came from Houston and belonged to Leidner.

[23] *U.S. vs. Leidner*, pg. 16.

[24] *Garcia*, 882 F.2d at 704.

[25] *Moetamedi*, 46 F.3d at 229; *Gendron*, 18 F.3d at 967; *Tagbering*, 985 F.2d at 950.

[26] T24.

Nor did his history, such as it was and is known, inspire confidence. The investigating officer, Kelvin Worker, knew that Sapp had been involved in another crime and suspected him of drug activity. The person he accused, Charles Leidner, however, was a previously unimplicated citizen.

Clearly, then, Sapp's accusations ought not to have gone untested. After all, Sapp was no "citizen informant,"[27] but a criminal, caught red-handed. Nor had he established his reliability through previous tips[28] but was apparently best known to the investigating officer through his involvement in another crime. His statements were neither consistent[29] nor told in an institutional setting.[30] As opposed to an informant who enforces his reliability before the magistrate at the probable cause hearing,[31] Sapp, rather than testify at the suppression hearing, signified his intention to plead the Fifth.

When inquiring as to whether there is a sufficient nexus between illegal contraband and the private premises to which it is to be delivered, the credibility of an informant should meet a high standard. In ordinary warrant cases, there is a safety net protecting the innocent from an informant's fingering: if the informant has provided improper information, no criminal objects will be found. But in cases of government-controlled deliveries, such as this one, the search warrant is self-fulfilling. The incriminating evidence can be delivered as, in this case, when the defendant is not home, and the warrant may be executed and charges brought for possession even if the defendant *never accepts or opens the packages.*

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[27] *U.S. vs. Towns*, (7 Cir. 1990) 913 F.2d 434 at 441.

[28] *Illinois v. Gates*, 462 US 213 at 230, 76 L Ed 2d 527 at 550, 103 S Ct 2317.

[29] *U.S. vs. Decoteau*, (7th Cir. 1991) 932 2d 1205 at 1207.

[30] *Gramenos vs. Jewel Companies, Inc.*, (7 Cir. 1986) 797 F.2d 432 at 439.

[31] *U.S. vs. Lloyd*, (7th Cir. 1995) 71 F.3d 1256 at 1263.

Thus, criminals, once caught, can enlist the police to pin their transgressions on another. The more cunning will finger someone guilty of a lesser, related crime, thereby making the set-up all the more convincing. In this way the casual doper, possessing a few ounces of cannabis for his own personal use, can be charged, tried and convicted for possession with intent to distribute 40 kilos.

Whether or not the Seventh Circuit majority erred in relying on the *Gates* totality-of-the-circumstances test to measure Sapp's credibility rather than use a higher standard, even under *Gates*, Sapp is not credible. The majority seeks to establish Sapp's reliability on the grounds that Sapp made a statement against his penal interest, i.e. he said he made a prior drug delivery. But this reasoning is doubly flawed. First, there is no evidence that Worker knew before he swore out the warrant that Sapp claimed to have made a prior delivery to Leidner. In fact, Worker's testimony and report suggest that he did not learn about Sapp's earlier statement until *after* he swore out his affidavit and obtained the warrant.[32] There is thus *no evidence* that either Worker or the magistrate considered this factor in swearing out and issuing the warrant.

Second, Sapp's statement, whether used to describe his so-called trips to Memphis or Houston, whether made before or after fingering Leidner, cannot override his other inconsistencies to make him suddenly credible. Indeed, once he admitted knowing about the drugs, his claim that they belonged to Leidner, and not him, was *for*, not against, his penal interest. Sapp hoped to serve *less* time by fingering Leidner, and the police encouraged him in this belief.[33]

As *Gates*' teaches, the inquiry into an informant's credibility should turn on "factual and practical considerations of everyday

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[32] T25.

[33] T22-23.

life on which reasonable and prudent men, not legal technicians, act."[34] To this end, it calls for a balanced assessment of the relative weights of *all* the various indicia of reliability.[35] Rather than examine the surrounding circumstances to determine Sapp's credibility, the majority appears to apply just the sort of rigid rule (prior delivery = against penal interest = credible witness) disapproved by *Gates*. Their conclusory declaration amounts to a *per se* finding of penal interest that fails to address or account for either his inconsistent statements or the real-life consequences (prosecutorial leniency) of Sapp's actions.

The importance given by the majority to the fact that an officer "corroborated" that Sapp rented the car—Sapp actually *handed* Heath the rental agreement—is misplaced. Besides, the "inquiry" showed that the car was in fact in Sapp's name. Nor is it clear how Sapp's Fayette County residency implicates Leidner. That two persons live in the same county (much less, city) suggests nothing more than a perhaps increased likelihood of acquaintanceship.

But Sapp's word, inconsistent, unsubstantiated and tainted by self-interest, brought forth the warrant. It and it alone purported to link Leidner to the drugs. No papers connected the two; no phone number; no address; nothing.

In finding there to be a pre-existing nexus between the drugs and Leidner, the Seventh Circuit failed to "hold the balance true."[36] Charles Leidner appeals to this Court to adjust the scales to their just and proper stations.

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[34] *Gates*, 76 L Ed 2d at 550.

[35] *Gates*, 76 L Ed 2d at 545.

[36] *Gates*, 76 L Ed 2d at 550.

II. DID THE POLICE ACT OBJECTIVELY REASONABLY IN PROCURING THE WARRANT WITHOUT INDEPENDENTLY CORROBORATING SAPP'S CLAIMS?

A. The Exclusionary Rule

The exclusionary rule is designed to remedy constitutional wrongs and to safeguard against future violations of like or analogous nature.[37] Under the rule, evidence obtained by wrongful police conduct is suppressed in order to deter future inappropriate action and to spur the police toward "a greater degree of care toward the rights of the accused."[38] Where the wrongful act is not caused by the police, however, there is generally no reason to believe that exclusion will deter future wrongful conduct, and the rule is not applied.[39]

The exclusionary rule applies, then, only in those circumstances where law enforcement officials intentionally, recklessly or negligently violate the Constitution. Thus, even if there was no probable cause for a warrant to issue, the rule does not apply if the officer acted in "objective good faith." Objective good faith is not understood as the absence of malice but is judged by the standard of a reasonably well-trained officer. Thus, if a trained, reasonable officer knew or should have known that the law prohibited his action, then his conduct was not objectively reasonable (and therefore without good faith), and the exclusionary rule applies. The standard, then, is negligence, and the Government appears to bear the burden of proof.[40]

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[37] *Arizona v. Evans* (1995) 115 S Ct 1185 at 1191, 131 L.Ed 2d 34, 63 US 4179.

[38] *United States v. Peltier* (U.S. 1975) 422 US at 539, 45 L Ed 2d 374, 95 S Ct 2313.

[39] *Arizona*, 115 S Ct 1185 at 1191.

[40] *Leon*, 468 US 897 at 924 ("When officers have acted pursuant to a warrant, the prosection should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time."); *U.S. v. Hendricks* (9 Cir. 1984) 743 F.2d 653 at 656.

B. Applying the Exclusionary Rule if a Warrant Affidavit Fails to Support Probable Cause

If a police officer negligently or recklessly swear outs an affidavit insufficient to show probable cause which nevertheless gives rise to a search warrant, the goods seized pursuant to the warrant will be suppressed. The idea is to encourage the officer to reflect on whether probable cause exists before submitting the warrant request.[41] This reflection is desirable because it reduces the likelihood that the officer's request will be premature. Premature requests lead to premature searches, which may injure the innocent, or, by giving the basis for a suppression motion, benefit the guilty.[42]

But not every warrant application that fails to give rise to proximate cause constitutes a so-called "bare-bones affidavit" and thereby requires suppression. Sometimes the affidavit fails through no fault of the officer. This Court found this to be true in *Leon*, where a facially valid search warrant was issued pursuant to an affidavit insufficient to establish probable cause. A long-time narcotics patrolman, Officer Rombach, swore out the affidavit after an extensive investigation,[43] which included stakeouts, numerous follow-ups on informant tips, and background checks.[44] The District Court commended the officer's thoroughness, noting that Rombach had surveyed the place a long time and laid a "meticulous trail."[45]

Refusing to exclude the seized evidence, this Court indicated that Rombach's sworn request was more than a "bare-bones

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[41] *Malley v. Briggs* (U.S. 1985) 475 US 335 at 343, 89 L Ed 2d 271, 106 S Ct 1092.

[42] *Malley*, 89 L Ed 2d at 280.

[43] *Leon*, 82 L Ed. 2d at 701.

[44] *Leon*, 82 L Ed. 2d at 684-685.

[45] *Leon*, 82 L Ed. 2d at 686, Footnote four.

affidavit" and noted that it provided evidence sufficient to cause "disagreement among thoughtful judges as to the existence of probable cause."[46] This was in reference to the decisions of the District Court, which found the probable-cause question to be "close" and of the Ninth Circuit panel, which divided on the issue.[47] Given the effort and resources involved in accumulating facts and information to support a probable-cause finding and the ultimate closeness of the issue, Rombach's reliance on the magistrate's determination was therefore objectively reasonable.[48]

Where an affidavit is clearly insufficient to support a probable-cause finding, however, the exclusionary rule still applies.[49] Thus, after finding the anticipatory warrant in *Ricciardelli* invalid, the First Circuit considered whether the postal-inspector affiant acted in objective good faith when he swore out the warrant application.[50] In ruling to suppress, the Court found that the warrant contained non-technical defects readily observable to experienced postal inspectors and, moreover, that the postmaster's omissions in the affidavit constituted a second, independently sufficient ground for excluding the evidence.[51] The principal omission in the warrant—the lack of any requirement that the contraband arrive at the premises—was both "glaring and easily correctable."[52] Because a reasonably prudent officer should have known that the warrant was substantially defective on its face, and because the defect was largely the result of the officers' incomplete account to the magistrate, the

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[46] *Leon*, 82 L Ed. 2d at 701.

[47] *Leon*, 82 L Ed. 2d at 686.

[48] *Leon*, 82 L Ed. 2d at 701.

[49] *Ricciardelli*, 998 F.2d at 8.

[50] *Ricciardelli*, 998 F.2d at 16.

[51] *Ricciardelli*, 998 F.2d at 16.

[52] *Ricciardelli*, 998 F.2d at 16.

good-faith exception did not apply and suppression was appropriate.[53]

C. *U.S. v. Leidner*

In determining whether the good-faith exception to the exclusionary rule applies in this case, one asks whether the police were objectively reasonable in procuring the anticipatory warrant. If the warrant affiant, Kelvin Worker, acted as a reasonably well-trained officer, then exclusion is improper; if he acted negligently, then exclusion is proper. Put another way, the question is—does Worker's conduct more closely resemble that of *Leon*'s Rombach or *Ricciardelli*'s postal inspector?

1. Failure to condition the search on the drugs' delivery.

The first defect was the failure to condition the search on the drugs' delivery in either the warrant or the affidavit. This is a more egregious error than that of *Ricciardelli's* postal inspector, who at least conditioned his search on the delivery of the parcel to the defendant. Furthermore, as Judge Harvey did not correct Worker's omission, the warrant was facially defective.

As in *Ricciardelli*, this omission was glaring, easily correctable, and largely a product of Worker's own negligence. Indeed, a representation by Worker that the warrant would not be executed prior to delivery would have cured this particular fault. Nor was this error a "mere technicality," unless authorizing a private search without probable cause is "technical." There was no cause, probable, improbable or otherwise, to search Leidner's residence *before* delivery, but the warrant papers authorize precisely this.

Worker is held to a reasonable knowledge of the law, and the law requires probable cause to search a residence. No reason-

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[53] *Ricciardelli*, 998 F.2d at 17.

ably well-trained officer would swear out a warrant whose probable cause is wholly founded on the delivery of contraband to a residence without offering to condition his search upon delivery. This is common sense. Nor would any reasonably prudent officer rely on a warrant absent such a condition or representation.

2. Failure to establish a pre-existing nexus between the drugs and Leidner's home.

Objectively unreasonable police conduct likewise ensured that there would be no nexus between the drugs and Leidner's residence. Unlike *Leon*'s Rombach, who sought to substantiate an informant's claim of cocaine sales by stakeouts, examining criminal histories and tracking suspects, the police never attempted to verify Sapp's story before securing the warrant. Nor was there any effort made to independently corroborate that the drugs belonged at Leidner's.

As in *Ricciardelli*, the defect arose directly out of the unreasonable conduct of the procuring law enforcement officers. For all the police knew and did, Sapp might have named *anyone*. Although Sapp originally told the officers that he had stayed in Memphis, no one sought to determine whether Sapp had been in Memphis or Houston or elsewhere. How then could they know whether he was suddenly telling the truth about Leidner? Apparently, they did not even ask Sapp to describe Leidner's home, as Worker made a special trip specifically to get a description for the warrant.[54] Nor did they field-test the "cannabis" but merely relied on an officer's opinion.

The situation, then, at the warrant's procurement, was this: A person previously under suspicion for drug-related activity is caught transporting what appears to be cannabis in a car rented in his own name. This same person tells several stories and

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[54] T70.

makes various inconsistent statements before naming Charles Leidner, someone not known to be involved in criminal activity. No one verifies the informant's story and no papers connect him or the drugs to Leidner. No one has contacted Leidner and the substance suspected of being cannabis has not been tested.

These facts would cause a reasonably prudent officer to reflect before swearing out a warrant application for Leidner's home. Such an officer would immediately recognize the temptation to lay the heart of the blame elsewhere. This is particularly true, here, where the police, rather than attempting to pin Sapp, encouraged him to name someone. Indeed, it was apparently Trooper Cooper, not Sapp, who first suggested that the drugs belonged to another.[55]

Sapp's previous self-serving statements, his earlier denials and minimal admissions (he made just *one* prior delivery?), would lead the reasonable officer to inquire further before acting on Sapp's accusation. Indeed, upon consideration, the Houston story is hardly damning: to believe him, Sapp merely left the keys in the car overnight and drove home. Naming Leidner fits neatly as just another statement made to advance his own self-interest.

Finally, the well-trained officer would consider Charles Leidner, the person whose home he was being encouraged to search. The officer knows nothing about him other than that Sapp has named him. But how does one know that he named the right person? What evidence points to Leidner as the drugs' owner?

Reflecting on these circumstances, the officer would conclude that it is premature to request a search warrant at this point. Further independent corroboration of Sapp's stories or other evidence linking Leidner to the crime would be required. This

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[55] T22

could be accomplished by calling one of the Houston hotels Sapp claimed to have stayed in. A phone call from Sapp to Leidner (saying, perhaps, that he was late) is another tactic.

Worker, however, did not reflect before swearing out the warrant, and the absence of this activity or any other police legwork is readily evident in his warrant application which is precisely the type of unsubstantiated, bare-bones affidavit disapproved by the Supreme Court in *Leon*. Unlike Rombach's warrant affidavit, over which thoughtful judges disagreed, there is no doubt that Worker's affidavit is defective. Nor can Worker, the procuring and executing officer, claim to be relying in good faith on the magistrate's determination, when it is Worker himself who declared Sapp to be "reliable" in his affidavit.

Indeed, Worker *did not even interrogate Sapp before applying for the warrant*.[56] Nor did he mention Sapp's previous inconsistent statements. The affidavit's claim that Sapp's statements are credible as being against his penal interest is most charitably characterized as misleading, as Sapp was encouraged to state a place for delivery in hopes of prosecutorial leniency.

Given these facts, the police had a moral, ethical, professional and constitutional obligation to seek to independently corroborate elements of Sapp's story. The idea that a known criminal character and admitted liar with no history of reliability, caught red-handed, can, through his untried word alone, cause a warrant to issue authorizing the delivery of drugs or other contraband to the residence of an apparently upstanding citizen for the purposes of conducting a search is chilling. Given the lofty conviction rates for federal drug offenses, the mandated minimum sentences and the extreme likelihood that the informant, like Sapp, will subsequently plead the Fifth rather than confront the accused, the possibility of innocents being incarcerated is all

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[56] T36.

too real. Judicial safeguards alone can provide the necessary protection.

III. DID JUDGE HARVEY ABANDON HIS ROLE AS A DETACHED AND NEUTRAL MAGISTRATE?

If the warrant's issuance pursuant to such an affidavit is alone insufficient grounds for questioning Judge Harvey's impartiality, the warrant itself is compelling evidence that he temporarily abandoned his neutral and detached role. No effort is made to locate Leidner's trailer, which is listed merely in "rural Fayette County." The warrant's execution is not preconditioned in time, whether to be executed "forthwith" or after delivery, and is addressed to all Illinois officers—including those unaware of Leidner's address. Rather than seek to restrict or guide police conduct, Judge Harvey issued a warrant giving the police broad powers to search a residence not known to contain evidence of any crime at the time and manner of their choosing.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1570

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CHARLES H. LEIDNER,
Defendant-Appellee.

Appeal from the United states District court
for the Southern District of Illinois.
No. 95 CR 30122—Paul E. Riley, Sr., *Judge.*

ARGUED AUGUST 6, 1996—
DECIDED NOVEMBER 7, 1996

Before BAUER, MANION, and DIANE P. WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* The government appeals the district court's decision granting a motion filed on behalf of defendant Charles H. Leidner ("Leidner") to quash an anticipatory search warrant and suppress evidence seized from Leidner's residence in violation of the Fourth Amendment. Based on the totality of the circumstances, we find that the search warrant was a valid anticipatory search warrant and was supported by probable cause, and therefore, we reverse the decision below.

I. Background

On October 15, 1995, Steven Sapp ("Sapp") was stopped in Missouri by a state trooper for a traffic violation. During the stop, the patrolman discovered that Sapp was transporting 200 pounds

of marijuana in the trunk of the car he was driving. Upon being arrested, Sapp revealed that he rented the car for purposes of transporting marijuana from Texas to Leidner's residence in rural Fayette County, Illinois. He alleged that Leidner agreed to pay him to make the delivery. He further admitted to successfully making and being paid by Leidner for such deliveries on previous occasions. After incriminating himself, Sapp agreed to assist the authorities by showing them where he was supposed to deliver the drugs and by wearing a recording device during the controlled delivery to Leidner's residence in Fayette County. After verifying that the car was rented, the Missouri police contacted Inspector Kelvin Worker ("Worker") of the Southeastern Illinois Drug Task Force. Worker acknowledged that Sapp was a local Fayette County resident known to Worker. Worker then spoke with Sapp on the telephone to confirm Sapp's arrest and that Sapp had agreed to cooperate by participating in a controlled delivery of the marijuana to Leidner's home.

Subsequently, Worker signed, verified, and submitted a "Complaint for Search Warrant" to a Fayette County Circuit Court Judge, James R. Harvey ("Judge Harvey"). This sworn complaint or warrant affidavit averred that Worker had probable cause to believe that marijuana *would be* located at Leidner's residence based on the information obtained from Sapp (identified as "John Doe" in the complaint) during the traffic stop by the Missouri police. More specifically, the complaint avouched that "John Doe was in the process of delivering said cannabis to Charles Leidner at Leidner's residence;" that Worker considered the informant's statements to be reliable since they were offered against the informant's penal interest; and that Doe "agreed to cooperate with law enforcement personnel . . . and is expected to deliver said cannabis to Charles Leidner's residence located in rural Fayette County, Illinois today being October 15, 1995." (Gov.'s Br. App. A-1). After reviewing this sworn complaint, Judge Harvey issued a search warrant authorizing a search of Leidner's residence. (Gov.'s Br. App. A-3). According to the

government, the judge orally[1] (though he did not so specify in the warrant) instructed the officers to execute the warrant only after Sapp made the delivery.

Although Leidner was not home when Sapp delivered the marijuana to Leidner's residence later that same evening, another person at the residence, James Thompson, helped Sapp unload the marijuana and then telephoned Leidner. Sapp then left and the officers waited until Leidner returned, approximately forty-five minutes later, to execute the search warrant. They subsequently arrested Leidner after finding at his residence the earlier-delivered marijuana along with lighted marijuana cigarettes, a firearm, ammunition, and Thompson.

On November 20, 1995, a federal grand jury in the Southern District of Illinois indicted Leidner for conspiracy to distribute marijuana and possession with intent to distribute marijuana. On January 12, 1996, the defendant, through counsel, filed a Motion to Suppress, alleging (1) that the search warrant was an unconstitutional anticipatory search warrant,[2] and (2) that the search warrant insufficiently identified the place to be searched. The court rejected the second ground but agreed that the anticipatory search warrant was constitutionally defective. The court found

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[1] Worker testified at the suppression hearing that Judge Harvey told him that since the warrant was an *anticipatory* search warrant Worker had to wait until Sapp made the delivery to Leidner's residence before he could execute it. (Tr. at 65, 66).

[2] In his motion to suppress, Leidner contended that the search warrant was unconstitutional (1) because the warrant failed to explicitly condition its execution on the delivery, (2) because it failed to ensure that the marijuana was on a "sure course" to Leidner's residence, (3) because it failed to describe the role to be played by the police in the delivery, (4) because it failed to include time restraints, and (5) because it failed to reflect that the issuing judge exercised a supervisory function as a neutral and detached magistrate. (R. at 44). Hence, other than challenging the lack of these protective safeguards, Leidner did not directly challenge the informant's reliability.

the warrant's "fatal defect" was its lack of any specified requirement that the drugs be delivered prior to execution of the warrant. (R. at 57). The court also rejected the government's argument that any defect in the warrant was cured by the officers' good-faith and justifiable reliance on the warrant. *Id.* On appeal, the government challenges both of these latter rulings.

II. Probable Cause for Anticipatory Search Warrant

In *Ornelas v. United States,* 116 S. Ct. 1657,1663 (1996), the Court held, as a general matter, that Fourth Amendment probable cause determinations are to be reviewed *de novo.* "Having said this, [the Court] hasten[ed] to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* This circuit has recently acknowledged the application of *Ornelas* to Fourth Amendment warrant cases. *United States v. Navarro,* 90 F.3d 1245, 1251 (7th Cir. 1996).

Anticipatory search warrants are peculiar to property in transit. Such warrants are issued in advance of the receipt of particular "property" (usually contraband) at the premises designated in the warrant based on probable cause that the property will be located there at the time of the search. *See United States v. Gendron,* 18 F.3d 955, 964 (1st Cir.), *cert. denied,* ___ U.S.. ___, 115 S. Ct. 654 (1994). As one commentator put it:

> [A]s a general proposition the facts put forward to justify issuance of an anticipatory warrant are more likely to establish that probable cause will exist at the time of the search than the typical warrant based solely upon the known prior location of the items to be searched at the place to be searched.

2 Wayne R. LaFave, Search and Seizure § 3.7(c), at 97 (2d ed. 1987). This circuit has long recognized the constitutionality of

such warrants. *See United States ex rel. Beal v. Skaff*, 418 F.2d 430, 434 (7th Cir. 1969) [hereinafter *Beal*]. Illinois courts have likewise noted that "the objective of the fourth amendment is better served by allowing the police to obtain a warrant in advance of delivery, rather than have the police go to the scene and proceed under the exigent circumstances exception to the warrant requirement." *People v. Ross*, 642 N.E.2d 914, 919 (Ill. App. Ct. 1994) (citations omitted).

While acknowledging that anticipatory search warrants are not *per se* unconstitutional, Leidner contends that the warrant here was unconstitutional because (1) it lacked an explicit statement that delivery of the marijuana was a condition precedent to its execution, and (2) because the complaint (or warrant affidavit) failed to establish an independent connection or "nexus" between Leidner's residence and the contraband found within,[3] and (3) the complaint failed to demonstrate that the marijuana was on a "sure course" to Leidner's residence. (Def.'s Br. at 9). The government resolutely seeks reversal of the district court's suppression ruling, arguing that " '[c]ontraband does not have to be presently located at the place described in the warrant if there is probable cause to believe that it will be there when the search warrant is executed.' " (Gov.'s Br. at 7) (citing *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978)). The government also contends that the warrant's lack of an explicit conditioning statement is not a constitutional defect and, in any event, is of no significant consequence since the judge verbally advised the officers at the hearing to wait until delivery before executing the search and since the officers, in fact, understood and abided by these admonitions. *Id.*

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[3] Although this reason was not specifically raised before the district court, we will consider it since this challenge is arguably implicit within Leidner's argument that the warrant failed to show that the contraband was on a "sure course" to Leidner's house.

First, we consider whether the district court erred in holding that the warrant's "fatal defect" was its failure

to explicitly limit its execution until after the delivery occurred. Although approving the use of anticipatory warrants as early as 1969 in *Beal*, 418 F.2d at 434, the Seventh Circuit has sparingly addressed the question of appropriate safeguards. In *Beal*, the magistrate issued a search warrant pursuant to an affidavit from the district attorney stating that a parcel believed to contain marijuana was in the post office and would be delivered to the defendant's residence. *Id.* at 433. The defendant challenged the warrant noting that there were no facts before the magistrate to support the belief that an offense "has been or is being committed." *Id.* at 433. The court upheld the anticipatory warrant finding little doubt that the warrant would be executed after delivery of the parcel. *See id.* Notably, the court did not address the issue of whether the Constitution requires the search warrant or the warrant affidavit to explicitly condition the search upon delivery of the contraband to the stated residence. *See id.*

In a subsequent case, this court focused on the language in the affidavits submitted with the anticipatory warrant request. *See United States v. Odlund*, 602 F.2d 148 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974). *Odlund* upheld the warrant noting that the affidavits demonstrated that a government-controlled delivery of the contraband to the residence-would take place. *Id.* at 152. Again, the court in *Odlund* did not specifically require, as a procedural safeguard, the warrant (or the warrant affidavit) explicitly to condition the search on the delivery.

Challenging the anticipatory warrant issued for his residence, Leidner points to a seminal case in the Second Circuit upholding the constitutionality of a search executed pursuant to an anticipatory warrant that expressly conditioned its execution upon delivery of the contraband to the location to be searched. *United States v. Garcia*, 882 F.2d 699, 701, 703-04 (2d Cir.), *cert. denied sub nom. Grant v. United States*, 439 U.S. 943 (1989). To

prevent abuses of the Fourth Amendment caused by premature executions of anticipatory search warrants, *Garcia* opined that anticipatory warrants should indicate where the alleged transfer will occur, how the affiant knew of the transfer, the affiant's opinion of the reliability of the information, and the role of the law enforcement officers in the expected transfer. *Id.* at 703. Moreover, the court in *Garcia* stated that these "warrant conditions governing the execution [should be] explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents." *Id.* at 703-04; *United States v. Ricciardelli,* 998 F.2d 8, 11-12 (1st Cir. 1993).

Based on our review of the warrant at issue, we find that the warrant would survive scrutiny under *Garcia.* Indeed, the warrant stated that the alleged transfer of contraband would occur at Leidner's residence, that the affiant learned of this transfer from an informant, that the affiant considered the informant reliable due to his against-interest statements, and that the transfer would occur through a controlled delivery in cooperation with the police. Still, Leidner argues that under *Garcia* anticipatory search warrants *must* also contain a sufficiently clear statement that the officers must delay executing the search until after the contraband is ultimately delivered to the place named in the warrant.

As stated earlier, we find no cases from this circuit requiring (as a matter of constitutional law) anticipatory warrants to explicitly state that the expected delivery must occur prior to execution of the warrant.[4] Hence, we do not believe that an anticipatory search warrant's constitutionality is doomed by the absence of such language even though other circuit courts in reviewing similar challenges to anticipatory warrants have sig-

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[4] We do not think an explicit conditioning statement is necessary where, as here, such a requirement is logically implicit.

nificantly focused on the presence or absence of such conditioning language.[5]

While *Garcia* and its progeny may support a preference that anticipatory search warrants contain such language, we are not compelled by the Constitution to require it since all that is constitutionally required is that the search warrant be supported by probable cause. *Illinois v. Gates,* 462 U.S. 213, 230 (1983). In any event, Leidner's counsel at argument agreed that the constitutionality of the warrant in this case did not depend, in fact, on the presence of such conditioning language. Leidner's counsel argued that even if the conditional language was present the warrant was still unconstitutional because the complaint failed to establish an independent nexus between the marijuana and Leidner's residence and because the warrant affidavit did not establish that the contraband was on a "sure course" to Leidner's residence.

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[5] *See United States v. Moetamedi,* 46 F.3d 225, 228 (2d Cir. 1995) (stating that an anticipatory warrant is valid even if it fails to explicitly condition its execution on delivery of the contraband when "clear, explicit, and narrowly drawn" conditions are contained in the warrant affidavit and those conditions are actually satisfied before the warrant is executed); *United States v. Gendron,* 18 F.3d 955, 967 (1st Cir.) (upholding warrant where postal inspector's affidavit specified that probable cause to search would arise only "after the parcel has entered the premises"), *cert. denied,* ___ U.S. ___, 115 S. Ct. 654 (1994); *United States v. Tagbering,* 985 F.2d 946, 950 (8th Cir. 1993) (upholding search where affidavit (even if not incorporated into the warrant) represented that warrant would not be executed until the package at issue was delivered by mail and accepted at the subject residence); *United States v. Rey,* 923 F.2d 1217,1221 (6th Cir. 1991) (upholding search where affidavit submitted in request for anticipatory warrant stated that execution would occur "subsequent to the delivery of package"); *United States v. Dornhofer,* 859 F.2d 1195, 1197 (4th Cir. 1988) (upholding search where magistrate explicitly conditioned the validity of the warrant on the contraband being placed in the mail addressed to the subject premises), *cert. denied,* 490 U.S. 1005 (1989).

Several circuits agree that in order for an anticipatory warrant to satisfy the probable cause standard it must demonstrate that contraband is on a "sure course" to the destination to be searched. *See, e.g., Gendron,* 18 F.3d at 967 (noting as significant the lack of doubt that the planned delivery would occur); *Ricciardelli,* 998 F.2d at 12 (noting that the "sure course" requirement ensures that the contraband, though currently elsewhere, will be present for the search); *Dornhofer,* 859 F.2d at 1198 ("When [the postal inspector] placed the contraband in the mail, the requirement . . . that the contraband was on a sure course to its destination was met."); *see also United States v. Upton,* 763 F. Supp. 232, 238 (S.D. Ohio 1991) (conceding that anticipatory warrants are commonly approved where the warrant is "expressly contingent upon delivery" or "where the contraband has been placed in the United States mail," but opining that "these methods do not exhaust the means by which an anticipatory warrant may be properly issued. The determining factor is whether the contraband 'is on a sure course to its destination.' "). The lack of such a nexus was instrumental in the First Circuit's decision (upon which the district court relied)[6] to quash an anticipatory warrant. *See Ricciardelli,* 998 F.2d at 11 (stating that the warrant was "fatally defective because it failed to forge a sufficient link between the [contraband] and the proposed search of appellant's abode"). In *Ricciardelli,* the contraband- containing package was mailed to the defendant's residence along with a return receipt requiring his signature. *Id.* at 13-14. Since he was not home to sign for it, he later retrieved it from the post office and brought it home. *Id.* at 14. Striking the warrant, the First Circuit noted that under the warrant terms, once the defendant retrieved

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[6] Although the district court cited *Ricciardelli* in support of its conclusion that the anticipatory warrant at issue fatally lacked a statement conditioning its execution upon delivery [to Leidner's residence] of the marijuana, the court also acknowledged that "the basis for the *[Ricciardelli* ruling] was that the warrant did not establish a nexus between the criminal act, the evidence to be seized, and the place to be searched." (R. at 57).

the package, postal inspectors could have searched his home whether or not he brought the contraband there. *Id.* Hence, the court found that the government failed to demonstrate a sufficient nexus or a "sure course" between the parcel and the defendant's home. Concurring that inadequately delineated warrants are subject to misunderstanding or manipulation by government agents, the district court applied *Ricciardelli's* principles to the case at hand and quashed the warrant.

The government contends that the district court's reliance on *Ricciardelli* is misplaced, arguing that *Ricciardelli* was wrongly decided and was effectively (though not explicitly) overruled by *Gendron,* 18 F.2d at 966-67. (Gov.'s Br. at 9). The government further contends that the "sure course" or nexus requirement was satisfied by Judge Harvey's admonitions to delay the search until after the scheduled delivery, as well as by the fact that the officers did, in fact, understand and heed this advice. Leidner disagrees. Furthermore, he attempts to distinguish the context of this case (where Sapp was scheduled to deliver the marijuana to Leidner's residence on the day the warrant issued) from that in cases where the contraband-containing parcel was mailed to the subject premises. (Def.'s Br. at 16) (noting that Sapp "is not the U.S. Postal Service"). Finally, Leidner argues that a link or connection *"independent of the prospective delivery"* between the site and the contraband is necessary "to check police from too readily executing warrants based on unsubstantiated claims by persons caught carrying contraband, like Sapp." *Id.*

Turning to these arguments, we first note that the Second Circuit did recently explain its decision in *Ricciardelli. See Gendron,* 18 F.3d at 966-67. The court in *Gendron* noted that the *Ricciardelli* court was highly influenced by certain background facts that made it ambiguous as to whether the receipt of the parcel would take place. *Id.* at 967 (finding it significant that the postal inspectors in *Ricciardelli* "undeniedly had envisioned" the possibility that the package would not be delivered to the

defendant's home at all). Hence, the court confined *Ricciardelli* to the facts of its case and upheld a warrant similar to the one struck down earlier in *Ricciardelli.* In this process, *Gendron* appears to discount any reliance on *Ricciardelli* except in similar cases where, for instance, there is recognized doubt that the contraband will ultimately be delivered to the defendant's residence identified in the search warrant.

It is thus necessary to consider whether, as the government argues, the present case is distinguishable from *Ricciardelli* since the officers were verbally instructed by the issuing Judge on the correct manner to execute the warrant and since the officers, in fact, heeded this advice. Even if we accept that the officers at the hearing were so instructed (Inspector Worker testified under oath regarding these verbal admonitions), the government has not demonstrated that this advice was passed along to all the officers executing the warrant. Moreover, this circuit has warned against drawing conclusions based solely on what actually occurred since probable cause determinations must be based on the evidence before the magistrate or judge issuing the warrant. *See Beal,* 418 F.2d at 431.

Leidner argues that, as in *Ricciardelli,* it was doubtful that the contraband was on a "sure course" to Leidner's house since the expected delivery was to be made by Sapp, rather than by a government agent or by the United States Post Office. We acknowledge that government-controlled deliveries may be more likely to reach their destination than those deliveries expected within the normal course of a drug organization's operations. *See Rivera v. United States,* 928 F.2d 592, 603 (2d Cir. 1991) (noting that "[w]hen the anticipatory warrant is not based on a delivery controlled by the government, there is a greater possibility that the expected drugs will not arrive."). But this line of reasoning actually hurts rather than supports Leidner since the scheduled delivery here was essentially a government-controlled delivery. The local judge, Judge Harvey, was advised that the informant

(Sapp) would personally deliver the marijuana to Leidner's residence, under the direction and supervision of the government. Hence, the expected delivery by Sapp, supervised by the government, is significantly different from those deliveries "expected in the ordinary course of the drug organization's operations." *See id.; cf. People v. Martini*, 638 N.E.2d 397, 403 (Ill. App. Ct. 1994) (noting that in the "majority of cases in which anticipatory warrants have been used . . . a drug shipment in the hands of a courier/informant served to establish that when that shipment was delivered to the dealer, probable cause to search would exist."). Thus, unlike in *Ricciardelli*, there was no indication of doubt impinging on the likelihood of the expected delivery and Judge Harvey could properly find that the "sure course" requirement was met. *See id.* at 603 (noting that a magistrate may conduct a lesser inquiry into the "sure course" factor when an anticipatory warrant request is based upon a government-controlled delivery).

Nevertheless, Leidner's counsel argued that suppression is warranted because Sapp could have named anyone he knew in an effort to transfer the blame from himself after being caught with the contraband in hope of getting a "better deal" from the authorities. In other words, Leidner takes issue with Sapp's reliability. The government contends that Leidner waived this argument since it was not presented below. We will consider it since, although the argument was not specifically stated this way below, the challenge is arguably implicit within those arguments that were raised.[7] Thus, we proceed to consider Leidner's argument that the warrant was constitutionally defective because it was based on an informant's unsubstantiated allegations.

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[7] Leidner's "sure course" argument arguably challenges whether the contraband was on a sure course to Leidner's house *before* Sapp was arrested. In other words, Leidner argues that the warrant must show a connection between Leidner and the contraband due to arrive at his house independent of Sapp's accusations.

Before applying for the warrant, the Missouri police corroborated that Sapp rented a car and that he was known to be a local resident of Fayette County. Judge Harvey was advised that the affiant, Officer Worker, personally knew Sapp and that he considered him reliable due to his statements made against his penal interest (concerning his prior deliveries). Worker also averred that Sapp agreed to make the delivery in cooperation with the law enforcement authorities. We have recently noted that "[c]redibility . . . is a matter of the totality of the circumstances." *United States v. Buckley,* 4 F.3d 552, 556 (7th Cir. 1993) (citing *Illinois v. Gates,* 462 U.S. 213, 234 (1983), *cert. denied sub nom. Herman v. United States,* 510 U.S. 1124 (1994)). Indeed, "even if we entertain some doubt as to an informant's motives, [her] explicit and detailed description of the alleged wrongdoing, along with a statement that the event was observed first hand, entitles [her] tip to greater weight than might otherwise be the case." *Gates,* 462 U.S. at 234. As in *Buckley,* Sapp's credibility increased when he admitted to making prior deliveries for Leidner. *See Buckley,* 4 F.3d at 556 ("For the search warrant to be supported by probable cause, [the informant] must have spoken against her penal interest at the time she admitted to [the arresting officer] that she purchased cocaine from the defendants."); *see also United States v. Harris,* 403 U.S. 573, 587 (1971); *United States v. Barnes, 909* F.2d 1059, 1069 (7th Cir. 1990) (noting than an informant's admission against his penal interest supports the informant's credibility).

In a recent case factually similar to this one, the Eighth Circuit used a "totality of the circumstances" approach to determine whether the contraband was on a "sure course" to the defendant's farm, and, therefore, whether there was sufficient probable cause for issuance of an anticipatory search warrant for the farm. *See United States v. Bieri,* 21 F.3d 811, 815 (8th Cir.), *cert. denied,* ___ U.S. ___, 115 S. Ct. 208 (1994). Like Sapp, the informant in *Bieri* was arrested with a large quantity of marijuana, told the

police that he was to deliver the drugs to the defendant's farm, and agreed to participate in a controlled delivery operation. *Id.* The court concluded that "the facts set forth in the affidavit regarding [the informant's] delivery were sufficient to establish that contraband would probably be found on the farm." *Id.* Accordingly, the court upheld the warrant and rejected the defendant's arguments in support of suppression.[8]

Under the totality of the circumstances, we find that the anticipatory search warrant was supported by probable cause. Moreover, the lack of explicit conditioning language does not constitute a constitutional defect. Accordingly, we REVERSE the district court's decision granting Leidner's motion to suppress based on an invalid anticipatory search warrant. The case is REMANDED for further proceedings consistent with this opinion.

DIANE P. WOOD, *Circuit Judge,* concurring in the judgment. In my view, the anticipatory search warrant in this case was constitutionally defective because it failed to ensure that the marijuana in Sapp's vehicle was on a "sure course" to Leidner's residence prior to the government's intervention. Nevertheless, because the police officers executing the warrant relied on it in good faith, the exception to the exclusionary rule announced in *United States v. Leon,* 468 U.S. 897 (1984), is applicable to this case. I therefore concur in the judgment of the Court.

As the majority notes, one of the grounds on which Leidner challenged the warrant was that it failed to ensure that the marijuana was on a "sure course" to Leidner's residence before the government took control of it. In order for an anticipatory warrant to satisfy the probable cause requirement, it must demonstrate that the contraband in question will be at the designated

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[8] Although the warrant in *Bieri* did contain a statement expressly conditioning the search upon delivery, the court placed little emphasis on this fact.

place at the time set for the search. See, *e.g., United States v. Ricciardelli,* 998 F.2d 8, 12 (1st Cir. 1993); *United States v. Dornhofer,* 859 F.2d 1195, 1198 (4th Cir. 1988), *cert. denied,* 490 U.S. 1005 (1989). The purpose of this requirement goes to the heart of the warrant requirement itself. Suppose, for example, that the government wished to search the home of Jane Doe, in Chicago, Illinois. DEA agents arrange to have a parcel containing marijuana delivered to her home at 3:00 the next afternoon, and then they go to a magistrate seeking an anticipatory search warrant, stating that they believe marijuana will be found at the house after that time. Their expectation is quite likely to be borne out, because the government itself made sure that the parcel would be there, but if this were enough to support a warrant the warrant requirement itself would become meaningless.

The majority appears to recognize this problem when, at page 11 *ante,* it acknowledges that "government-controlled deliveries may be more likely to reach their destination than those deliveries expected within the normal course of a drug organization's operations," and further when it admits that Sapp could have named anyone he knew when he was arrested. Once Sapp named Leidner, there was obviously no doubt that the marijuana would end up at Leidner's home; Sapp made the delivery under the government's control. But the warrant gave no reason to believe that the shipment was on a "sure course" to Leidner's home *before* Sapp made his statement to the agents. No address appeared on the packages; no evidence indicated that Leidner's address or telephone number was in Sapp's possession. Execution of the warrant was not contingent upon the establishment of any nexus between the marijuana Sapp was transporting and Leidner. This case is therefore distinguishable from *United States v. Bieri,* 21 F.3d 811 (8th Cir.), *cert. denied,* 115 S.Ct. 208 (1994), on which the majority relies. In *Bieri,* the informant had made prior deliveries of marijuana to the residence of the Bieris, and Susan Bieri personally paid $300 for the marijuana *before* the anticipatory warrant was executed. Here, Leidner was not

even at home when Sapp made the government-controlled delivery.

The problem of government manipulation is unique to anticipatory warrants, because in the normal situation a warrant will issue only if there is probable cause to believe that contraband is already at the place to be named in the warrant. When the contraband is admittedly *not* at the place named in the warrant, it should not be enough for the government itself (or its agent) to transport it to that place and then execute a search. This tactic would effectively transform the anticipatory warrant into an unconstitutional general warrant. See generally James A. Adams, *Anticipatory Search Warrants: Constitutionality, Requirements, and Scope,* 79 Ky. L.J. 681(1991) (outlining the requirements that anticipatory search warrants should have in order to remain constitutional). Even though I am confident that the government would not normally target an anticipatory warrant toward a home they wished to search for other reasons, the purpose of the warrant requirement is to ensure that the rare cases of abuse do not occur. I would therefore require, as part of the probable cause showing for an anticipatory warrant, a showing of some pre-existing nexus between the contraband and the place to be searched that is not wholly within the government's control. See generally *Ricciardelli,* 998 F.2d 8 at 12-14.

In this case, the police officers executing the warrant had no reason to know that this crucial link was missing. All they knew was that an informant found to be reliable "was in the process of delivering" the marijuana to Leidner, at his residence, and that the delivery was expected on October 15, 1995. Because the defect did not appear on the face of the warrant, the good-faith exception of *Leon* requires us to refrain from invoking the exclusionary rule. For this reason, I concur in the judgment of the Court.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 9, 1996

No. 96-1570

BEFORE

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. DIANE P. WOOD, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CHARLES H. LEIDNER,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 95 CR 30122

Paul E. Riley, Sr., *Judge*.

ORDER

On consideration of the petition for rehearing en banc filed in the above-entitled cause by defendant-appellee, taken as a petition for rehearing with suggestion for rehearing en banc, no judge in active service has requested a vote thereron, and all of the judges on the original panel have voted to deny.

Therefore, the petition for rehearing with suggestion for rehearing *en banc* is hereby **DENIED.**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NO: 95-CR-30122-PER

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES LEIDNER,
Defendant.

MEMORANDUM AND ORDER

[Filed: Feb. 21, 1996]

I. Introduction

Riley, District Judge

This narcotics case involved three co-defendants, two of whom have pled guilty. The case against the third co-defendant, Charles H. Leidner, is set for trial on March 4, 1996. Now before the Court is Leidner's Motion to Suppress Evidence filed January 12, 1996 (Doc. 44). A hearing was held and arguments presented on February 8, 1996. The Court allowed additional time for the submission of closing arguments/briefs. Those briefs have now been received by the Court. An overview of key facts begins the Court's analysis of this motion.

II. Relevant Facts

On November 20, 1995, a three-count indictment was returned against Defendant Leidner, charging him with: (1) conspiracy to distribute marijuana, a violation of 21 U.S.C. § 846; (2) possession with intent to distribute marijuana, a violation of 21 U.S.C. § 841(a)(1); and (3) using and carrying a firearm during and in relation to a drug-trafficking crime, a violation of

18 U.S.C. § 924(c). The United States of America ("the Government") moved for dismissal of Count III (the gun count), and the Court granted that motion on January 30, 1996.

The evidence before this Court (including the testimony of the witnesses at the February 8 hearing) establishes the following. On October 15, 1995, Corporal Jeff Heath of the Missouri Highway Patrol stopped a rental vehicle which was being driven by Steven Sapp. Sapp denied that any drugs were in the vehicle. A search, however, revealed approximately 200 pounds of marijuana in duffel bags in the trunk of the car. Officer Heath transported Sapp to Hayti, Missouri, where Sapp was interviewed by Trooper William Cooper of the Missouri State Highway Patrol. Trooper Cooper questioned Sapp outside the presence of any other officers for a period of forty-five minutes to an hour. Officer Heath then joined Cooper and Sapp.[1]

After being advised of the seriousness of the charges facing him (including the possibility of a 15-year imprisonment), Sapp expressed a willingness to cooperate with the authorities in completing the delivery of the marijuana to what Sapp claimed was its ultimate destination — Defendant Leidner's residence in Fayette County, Illinois. Corporal Heath contacted the Fayette County Sheriff's Office, who in turn contacted Illinois State Police Inspector Kelvin Worker. While Sapp was *en route* from Missouri to Illinois, Worker drove past the Leidner residence and obtained a description that could be used in applying for a search warrant. Worker compiled the information for the search warrant and presented it to the State's Attorney that afternoon (October 15, 1995). The State's Attorney's secretary typed up

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[1] Sapp initially stated that he was a truck driver. Sapp also told the officers that he had picked up the marijuana in Memphis, where he had stayed at hotels, the names of which he could not recall. Sapp later stated that he had obtained the marijuana in Houston, Texas and was in the process of delivering it to Leidner's home in Fayette County, Illinois.

the warrant and complaint, and returned the paperwork to Worker. Worker signed the affidavit supporting the search warrant.

Heath, Cooper and Sapp left Hayti, Missouri around noon and drove to Effingham, Illinois, arriving around 4:30 p.m.[2] In Effingham, they met with Worker and two other Illinois State Police/Southeast Illinois Task Force officers, Master Sergeant Kim Rhodes and Sergeant Kelly Henby. Worker estimates that this meeting occurred around 5:30 p.m. Around 5:03 p.m. *(i.e.,* about a half-hour prior to meeting with Sapp), Worker and Rhodes had presented the application for search warrant and the affidavit to Fayette County Circuit Court Judge James R. Harvey at his residence.

Judge Harvey found that the application stated facts sufficient to show probable cause and issued a warrant for the search of "the residence occupied by Charles Leidner, located in rural Fayette County, Illinois, more particularly described as a single wide mobile home beige in color with brown trim and a screened-in porch." Worker's affidavit — which recounted the facts regarding the traffic stop, the discovery of the marijuana and Sapp's intention to deliver it to Leidner's residence — apparently was neither attached to the search warrant nor incorporated therein.

Worker then met with Sapp, who had arrived with the Missouri officers. Worker made arrangements for Sapp to wear an eavesdropping device and complete the delivery later that evening. Worker parked his vehicle on road 700 North, to the West of Leidner's residence. On surveillance outside the residence was Inspector Mark Weber of the Southeast Illinois Task Force.

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[2] Although no record of this appears in Worker's reports or summary, Worker apparently spoke very briefly with Sapp while Sapp was being held in Missouri. According to Worker, Sapp said "I'm going to Chuck's" [meaning Leidner's residence], and Worker replied "You're doing the right thing."

Weber prepared a report which indicates that at 8:42 p.m. a vehicle drove eastbound past the intersection of 700 North and 300 East roads.

Sapp delivered the marijuana to the Leidner residence around 8:45 p.m. Leidner was not present. Another person present at the residence, James Thompson, assisted Sapp in unloading the marijuana into the inside of Leidner's trailer. Sapp then left. Weber, on surveillance, noted that the same vehicle drove back past the intersection — this time, headed west — at 8:48 p.m.

Leidner arrived home around 9:20 or 9 25 p.m. At 9:30 p.m., Worker and several other officers approached the trailer's front door. Leidner stood up and answered. The officers identified themselves, subdued and cuffed Leidner on the front porch, and cuffed Thompson outside (apparently Thompson fled through the back of the trailer). The warrant was executed and the trailer searched. In addition to the just-delivered marijuana, the officers found a lighted marijuana cigarette on the coffee table near the couch and a bag of cannabis, plus a bag of a white powdery substance on Leidner's person.

III. Analysis of Motion to Suppress

The Fourth Amendment to the Constitution provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The fundamental purpose of this amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *Camara v Municipal Court,* 387 U.S. 523, 528 (1967). Historically, the federal courts have expressed a strong preference for search warrants, which are designed to provide the detached scrutiny of a neutral magistrate, "which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *U.S. v. Leon,* 468

U.S. 897, 913-14 (1984), *quoting U.S. v. Chadwick*, 433 U.S. 1, 9 (1977).

Of course, a warrant *was* obtained here, and the challenge to the evidence is not that the search was warrantless. Leidner's dual challenges are that the warrant did not adequately describe the place to be searched and that it did not adequately specify *when* the search could be undertaken.

The Court finds little merit in the first of those arguments — the insufficiency of the description of Leidner's residence. Although the Court firmly believes that Inspector Worker could have been more specific in describing Leidner's mobile home, the Court believes the trailer was described with enough particularity to enable the executing officers to locate and identify it readily. Leidner's street address, or directions such as "x miles east of the town of Pittsburg," would have been appropriate additions to the warrant, but there is no indication on the record that Worker or the other officers had any difficulty finding the mobile home. Nor was the wrong residence searched.

The Fourth Amendment's particularity requirement is satisfied if "the description is such that the officers ... can with reasonable effort ascertain and identify the place intended." *United States v. Nafzger*, 965 F.2d 213, 215 (7th Cir. 1992), *citing Steele v. United States*, 267 U.S. 498, 503 (1925). Elaborate specificity is not required by the Fourth Amendment. *United States v. Freeman*, 532 F.2d 1098, 1100 (7th Cir. 1976). Rather, "the test is one of reasonableness." *Id.* The warrant here met that test, and suppression is not warranted on this ground.

Turning to the second argument for suppression, the Court notes that the warrant issued by Judge Harvey was anticipatory in nature. An anticipatory search warrant is a warrant based on an affidavit showing probable cause that at some, *future* time, certain evidence of a crime *will be* located at a specified place.

2 W. LaFave, *Search and Seizure*, § 37(c) at p. 37 (2nd ed. 1987).[3] Leidner cites a seminal federal court decision on the validity of such warrants, *U.S. v. Garcia*, 882 F.2d 699 (2nd Cir. 1989). In *Garcia*, the Court noted that anticipatory search warrants are not unconstitutional *per se*, but when one is used: "the magistrate should protect against its premature execution by listing in the warrant conditions governing the execution which are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents." *Id.* at 704.

The warrant here fell short of this requirement. The warrant does *not* contain explicit conditions governing its execution. More particularly, the warrant did not require that the delivery of the drugs *precede* the search. The Government asserts that the issuing Judge *told* the officers that they should not execute the warrant until after the marijuana was delivered. Setting aside any credibility issues as to Worker's statements regarding the admonition given him by Judge Harvey (which admonition Worker claims he conveyed to Sergeant Henby who then allegedly passed it along to all the other officers at the pre-search "briefing"), oral suggestions simply cannot take the place of written directives in a search warrant. The lack of any requirement that the drugs be delivered before the search was commenced is a fatal defect here.

The First Circuit addressed a strikingly similar set of facts in *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993). There, Houston postal inspectors applied for (and a magistrate issued) a search warrant authorizing the search of a suspected child pornographer's residence. The search warrant *in Ricciardelli*, like the warrant here, was an anticipatory warrant. The *Ricciardelli* warrant, however, was more narrowly drawn. That warrant explicitly stated that it would not be effective "until after deliv-

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[3] *Accord United States v. Ricciardelli*, 998 F.2d 8,10 (lst Cir. 1993) (Anticipatory warrants are warrants issued in advance of the receipt of particular property at a designated place.).

ery by mail to and receipt by Steven L. Ricciardelli of the . . . package containing the videotape." *Id.* at 9. The First Circuit rejected Ricciardelli's initial argument that anticipatory warrants are *categorically* unconstitutional:

> We hold, therefore, that when law enforcement personnel offer a magistrate reliable, independent evidence indicating that a delivery of contraband will very likely occur at a particular place, and *when the magistrate conditions the warrant's execution for the search of that place on that delivery*, the warrant, if not overbroad or otherwise defective, passes constitutional muster.

Id. at 11 (emphasis added).

The Court, however, went on to conclude that the warrant in question did not impose sufficient conditions, and thus the Court reversed the District Court's denial of a suppression motion and vacated Ricciardelli's conviction. The basis for the ruling was that the warrant did not establish a nexus between the criminal act, the evidence to be seized, and the place to be searched. *Id.* at 13. Specifically, the warrant triggered the search on the delivery of the videotape, but not on Ricciardelli's *receipt* or *possession* of that videotape. The Court explained that the warrant should have conditioned the search not on the arrival of the videotape at Ricciardelli's home, but rather on Ricciardelli's personal receipt of the videotape. "By the terms of the warrant, once [Ricciardelli] retrieved the package at the post office, the postal inspectors could have searched his abode whether or not [Ricciardelli] brought the contraband there. An anticipatory search warrant that cedes such great discretion to the executing agents cannot withstand constitutional scrutiny." *Id.* at 13 (emph. added).

The warrant in the case at bar differs somewhat from the *Ricciardelli* warrant, but the principles applied therein apply here with equal force. In both cases, the conditions governing execution of the anticipatory search warrant were not adequately delineated in the warrant, and "were extremely susceptible to the

discretion of the executing officers." *Id.* at 14. Nor was the future search of Leidner's residence "made expressly contingent upon the contraband's arrival there." *Id* at 12. The oral contingencies supposedly placed on execution of the warrant simply do not provide sufficient safeguards against misunderstanding or manipulation by government agents and law enforcement officers. *See Garcia* at 704.

The Government counters that even if the warrant was defective, the agents were justified in relying on it (and *did* rely on it in good faith) and, therefore, *United States v. Leon*, 468 U.S. 897, 919-20 (1984), renders suppression unwarranted. *Leon* did significantly shorten the reach of the exclusionary rule by holding that when police obtain evidence in good faith reliance on a warrant later found to be defective, exclusion of the evidence serves no salutary purpose because "there is no police illegality and thus nothing to deter." *Leon*, 468 U.S. 921. But this Court is not persuaded that *Leon* prohibits suppression of the evidence seized in the Leidner search.

As the First Circuit pointed out in rejecting a similar argument in *Ricciardelli*, there are still instances in which suppression is proper — for instance, if the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *Ricciardelli* at 15.

> To summarize, the exclusionary rule is alive and well to the extent that a warrant's defectiveness results from either (1) non-technical errors of a kind that a reasonably prudent officer would (or should) have recognized, or (2) law enforcement officers' acts or omissions of a kind that a reasonably prudent officer would have avoided.

Id.

Here, Inspector Worker was not objectively reasonable in relying on the defective warrant because, *inter alia*, the defects contained therein were readily apparent. In the words of the First Circuit, *Ricciardelli* at 16:

> The law was settled that the conditions governing the execution of anticipatory warrants must be explicit, clear, and narrowly drawn. The instant warrant plainly did not satisfy these criteria, and, furthermore, *the principal omission in the warrant — the lack of any requirement that the contraband arrive at the premises* — was both glaring and easily correctable.

The officers' attempt to execute an anticipatory search warrant in the absence of this plainly-needed condition fell "outside the range of professional competence expected" of the law enforcement officers. *Ricciardelli* at 16, *citing Malley v. Briggs,* 475 U.S. 335, 346 n.9 (1986).

In short, the warrant executed herein was not a constitutionally valid anticipatory search warrant. It is *less* specific than the warrant struck down in *Ricciardelli.* It contained no condition that the execution occur *after* delivery of the marijuana to Leidner's residence. As such, the Fourth Amendment would be violated by introduction of evidence seized via its execution. As in *Ricciardelli,* the warrant "suffered from a fatal defect that was . . . not subject to amelioration under the *Leon* doctrine." *Id.* at 17.

IV. Conclusion

Accordingly, Defendant Leidner's Motion to Suppress (Doc. 44) is hereby **GRANTED**. The evidence seized pursuant to execution of the search warrant on Leidner's residence on October 15, 1995 will be suppressed.

IT IS SO ORDERED.

DATED this 21 day of February, 1996

/s/ Paul E. Riley
PAUL E. RILEY
United States District Judge

APPENDIX D

STATE OF ILLINOIS
COUNTY OF FAYETTE
IN THE CIRCUIT COURT

COMPLAINT FOR SEARCH WARRANT

[Filed: Oct. 16, 1995]

Complainant, Kelvin Worker, Inspector with the Southeastern Illinois Drug Task Force, now appears before the undersigned Judge of the Fourth Judicial Circuit and requests the issuance of a Search Warrant to search a residence occupied by Charles Leidner located in rural Fayette County, Illinois, near Pittsburg, Illinois more specifically described as a single wide mobile home beige in color with brown trim and has a screened-in porch and any and all outbuildings on said property and to seize the following:

> Any and all instruments, articles or things which have been used in the commission of, or which may constitute evidence of the offense of Unlawful possession or delivery of Cannabis, including, but not limited to Cannabis and any items, devices, documents or instruments used in connection with said offense and any and all contraband in relation hereto.

Complainant has probable cause to believe that cannabis will be located in the residence, based upon the following facts:

1. That on October 15, 1995, your complainant, Inspector Kelvin Worker of the Southeastern Illinois Drug Task Force was notified via telephone by Corporal Jeff Heath of the Missouri Highway :Patrol, that a John Doe had been stopped on a routine traffic stop and approximately 200 pounds of cannabis was found in John Doe's vehicle.

2. John Doe advised Corporal Heath that he had left Fayette County, Illinois and went to Texas where he purchased approximately 200 pounds of cannabis. John Doe was in the process of delivering said cannabis to Charles Leidner at Leidner's residence located in rural Fayette County, Illinois.

3. John Doe is personally known by your complainant and is known to also reside in Fayette County, Illinois.

4. That the statements made by John Doe are against his penal interest which enhances his reliability.

5. That John Doe has agreed to cooperate with law enforcement personnel in Missouri and Illinois and is expected to deliver said cannabis to Charles Leidner at Charles Leidner's residence located in rural Fayette County, Illinois today being October 15, 1995.

6. That Corporal Heath is an experienced highway patrolman and as such knows the purported cannabis to be cannabis.

WHEREFORE, Complainant prays that a search warrant may issue according to law.

/s/ Kelvin Worker
Complainant

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Kelvin Worker

Subscribed and sworn to before
me this 15 day of October A.D., 1995

/s/James R. Harvey
Circuit Judge

APPENDIX E

STATE OF ILLINOIS
IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
FAYETTE COUNTY

No. 95 MR 29

THE PEOPLE OF THE STATE OF ILLINOIS,

vs.

CHARLES LEIDNER,
Defendant.

SEARCH WARRANT

[Filed: Oct. 16, 1995]

TO ALL PEACE OFFICERS OF THE STATE OF ILLINOIS or Inspector Kelvin Worker of the Southeastern Illinois Drug Task Force: ON THIS DAY Inspector Worker of the Southeastern Illinois Drug Task Force COMPLAINANT, HAS SUBSCRIBED and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that the residence occupied by Charles Leidner, located in rural Fayette County, Illinois more particularly described as a single wide mobile home beige in color with brown trim and a screened-in porch and any and all outbuildings on said property be searched and the following instruments, articles, and things which have been used in the commission of, or which may constitute evidence of the offense of Unlawful Possession or Delivery of Cannabis, including but not limited to Cannabis and any items, devices, documents or instruments used in connection with said offense and any and all contraband in relation thereto be seized therefrom:

I further command that a return of anything so seized shall be made without unnecessary delay before me or before any court of competent jurisdiction.

/s/ James R. Harvey
Judge

Date of issuance 10/15, 1995

Time of issuance 5:03 p.m.